Supreme Court, U.S.
FILED
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No. 95-1328

In the Supreme Court of the United States

OCTOBER TERM, 1995

FIRST NATIONAL BANK & TRUST, WIBAUX, MONTANA, ET AL., PETITIONERS

v.

THE COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency violated the Due Process Clause by appointing a conservator for a national bank without notice and prior hearing, in accordance with the provisions of the Bank Conservation Act, 12 U.S.C. 201 *et seq.*

2. Whether the court of appeals correctly ruled that post-appointment judicial review of the Comptroller's decision is limited to the administrative record.

3. Whether the Comptroller's action in appointing a conservator was arbitrary and capricious.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A38-A53) is reported at 63 F.3d 894. The opinions of the district court denying petitioners' request for an evidentiary hearing (Pet. App. A6-A11), limiting review to the administrative record (Pet. App. A12-A20), and granting the government's motion for summary judgment (Pet. App. A21-A33) are unreported.[1]

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[1] The petitioner's appendix does not include the administrative decision of the Comptroller of the Currency. We have

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1995. A petition for rehearing was denied on October 30, 1995. The petition for a writ of certiorari was filed on January 23, 1996, but was not docketed until February 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 203(a) of the Bank Conservation Act, 12 U.S.C. 201 *et seq.*, as codified during the time period relevant to this suit, empowered the Comptroller of the Currency to appoint a conservator for a national bank "without notice or prior hearing" whenever he determined that "there is a willful or continuing violation of an order [such as a cease and desist order] enforceable against the bank under section 8(i) of the Federal Deposit Insurance Act [12 U.S.C. 1818(i)]." 12 U.S.C. 203(a)(7) (Supp. II 1990). Section 203 also authorized the Comptroller to appoint a conservator for a national bank "without notice or prior hearing" if he found "a violation or violations of laws, rules, or regulations, or any unsafe or unsound practice * * * likely to cause insolvency or substantial dissipation of assets or earnings, or * * * likely to weaken the bank's condition or otherwise seriously prejudice the interests of its depositors." 12 U.S.C. 203(a)(5) (Supp. II 1990).[2]

2. On January 15, 1987, Edward Towe became the president and chief executive officer of the First

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lodged a copy of that 124-page decision with the Clerk of the Court.

[2] The current provisions are substantially identical. See 12 U.S.C. 203(a) and 1821(c)(5); see also Pet. App. A41 n.2.

National Bank and Trust, Wibaux, Montana (the Bank), a national bank located in a small town in Eastern Montana. Pet. App. A22, A40. At the time of Towe's appointment, the Bank was operating under a 1986 cease and desist order imposed by the Comptroller of the Currency, its primary federal regulator. *Id.* at A31, A40. From 1987 to 1992, the Comptroller issued examination reports noting the Bank's noncompliance with the terms of the cease and desist order and with various applicable laws and regulations. *Id.* at A40; see *id.* at A9.

On May 5, 1992, the Comptroller wrote a letter to the Bank's board of directors describing the "unacceptable" history of the Bank's failure to comply with the cease and desist order and other regulatory and statutory requirements and requesting a response "[d]ue to the seriousness of the matters discussed." Pet. App. A40. The board, Edward Towe, and his son, Thomas Towe, who served as the Bank's attorney, all responded in writing. *Id.* at A41. The Comptroller considered those responses and, on June 25, 1992, appointed a conservator for the Bank pursuant to 12 U.S.C. 203(a) (Supp. II 1990). The Comptroller set forth the reasons for the appointment of a conservator in a 124-page administrative decision. The decision noted, among other things, that the Bank had unlawfully granted favorable treatment to its affiliates, had exceeded the five-year holding deadline for certain foreclosed properties, and had violated at least eight of the seventeen articles of the cease and desist order. See Pet. App. A41.

3. Petitioners sued the Comptroller in district court, seeking to terminate the conservatorship. They contended that the Comptroller had violated the Due Process Clause by appointing a conservator

without a prior hearing. They also contended that the Comptroller's decision to appoint a conservator was arbitrary and capricious. The district court denied petitioners' post-appointment motions, Pet. App. A6-A20, granted the Comptroller's motion for summary judgment, *id.* at A21-A35, and denied petitioners' motion to alter or amend the judgment, *id.* at A36-A37.

The court of appeals affirmed. Pet. App. A38-A53. That court concluded that the Due Process Clause did not entitle petitioners to a hearing before appointment of a conservator and that the district court's post-appointment review did not require it to go outside the administrative record. *Id.* at A43-A48. In addition, the court held that the Comptroller's decision to place the Bank in conservatorship was not arbitrary and capricious. *Id.* at A51-A53. The court concluded that the Bank's violation of the provisions of the cease and desist order, standing alone, justified the appointment of a conservator. *Ibid.*[3]

ARGUMENT

1. The court of appeals correctly rejected petitioners' arguments (Pet. 13-24) that the Comptroller violated the Due Process Clause by failing to provide a hearing before appointing a conservator. The Comptroller's appointment of a conservator was the

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[3] Following the decision of the court of appeals, petitioners filed a motion to stay the sale of the Bank. The district court granted that motion, but the court of appeals dissolved the stay at the time it denied petitioners' petition for rehearing. Pet. App. A54-A55. See also *First Nat'l Bank & Trust Co., Wibaux, Montana* v. *Comptroller of the Currency*, No. A-410 (applications for stay denied Nov. 9, 1995 (O'Connor, J.); Dec. 11, 1995 (full Court)). The conservator has since sold the bulk of the Bank's assets and deposits to FirstWest Bank of Glendive, another local institution.

product of the Comptroller's on-going bank examination process that, prior to the appointment, had led to notice of irregular bank practices and had generated a cease and desist order. As the court of appeals stated, the Bank had "ample opportunity" to respond to the Comptroller's concerns regarding its performance "when it received adverse examinations between 1986 and 1992, and when it responded to the Comptroller's May 5, 1992 letter." Pet. App. A48.

In any event, the Comptroller's exercise of his statutory authority to appoint a conservator without a prior hearing does not violate due process. This Court has recognized that the Constitution does not require a pre-deprivation hearing "where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993). See *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988). As the court of appeals noted (Pet. App. A43), the public interest in preventing unsafe and unsound banking practices justifies appointing a conservator without a prior hearing. *Fahey* v. *Mallonee*, 332 U.S. 245, 253-254 (1947).[4] In this case, the Bank had failed to mend its ways in response to "less drastic enforcement measures," and the government

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[4] Accord *Fidelity Sav. & Loan Ass'n* v. *FHLBB*, 689 F.2d 803, 811 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983); *Franklin Sav. Ass'n* v. *Director, OTS*, 934 F.2d 1127, 1140 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992); *First Fed. Sav. & Loan Ass'n* v. *Ryan*, 927 F.2d 1345, 1357-1358 (6th Cir.), cert. denied, 502 U.S. 864 (1991); *Haralson* v. *FHLBB*, 837 F.2d 1123, 1126-1127 (D.C. Cir. 1988); *Woods* v. *FHLBB*, 826 F.2d 1400, 1411-1412 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).

"had a strong interest in moving quickly to avoid dissipation of the Bank's assets." Pet. App. A44.[5]

2. The district court's review of petitioners' claims was also appropriately limited to the administrative record. As a general proposition, judicial review of an agency decision is ordinarily restricted to the record compiled by the administrative agency. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). As every court of appeals to have addressed the issue (including the court below) has concluded, the scope of review is no different in cases involving a banking regulator's decision to appoint a conservator or receiver for a troubled financial institution. See *Franklin Sav. Ass'n*, 934 F.2d at 1140 (10th Cir. 1991); *Woods*, 826 F.2d at 1409; *Guaranty Sav. & Loan* v. *FHLBB*, 794 F.2d 1339, 1342 (8th Cir. 1986); Pet. App. A47.[6] While Section 203(b)(1) of the Bank Conservation Act provides that the district court's review of the appointment of a conservator for a national bank should be "upon the merits," 12 U.S.C. 203(b)(1), that phrase provides neither for "a full adversarial and evidentiary hearing, nor * * * de novo review of appoint-

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[5] Petitioners have not made a persuasive showing of any entitlement to a pre-deprivation hearing. They were well aware that the Bank's operations were subject to an extensive regulatory system, including regular examination, that the Bank was operating under a cease and desist order, and that it had a poor record of compliance with bank laws and regulations. Pet. App. at A44. See *Woods*, 826 F.2d at 1411-1412. Additionally, the availability of post-deprivation review by the district court minimized the possibility of erroneous deprivation. Pet. App. A44-A45. See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

[6] See also *Marietta Franklin Securities Co.* v. *Muldoon*, No. 93-3432, 1994 WL 399550, at *2 (6th Cir. Aug. 1, 1994) (unpublished) (per curiam), noted at 30 F.3d 134 (Table).

ment decisions," but simply that the court's "decision to either dismiss the action or remove the conservator should be based upon the merits of the action (*i.e.*, whether statutory grounds for the appointment of a conservator exist), rather than on procedural or policy oriented grounds." *Franklin*, 934 F.2d at 1138.[7]

Post-appointment judicial review based on the administrative record is "adequate to assure against the risk of mistaken deprivations." *Woods*, 826 F.2d at 1411. Under the statutory scheme, a national bank has the right to have a conservatorship terminated if the Comptroller did not give "fair and reasoned consideration to all relevant factors before determining that one or more of the statutory grounds for appointment of a [conservator] exist[]." *Ibid.* The district court is able to make that determination by reviewing the administrative record, which sets out the Comptroller's justifications for his action. *Ibid.*; *Franklin Sav.*, 934 F.2d at 1140; *Haralson*, 837 F.2d at 1126-1127.[8]

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[7] The court of appeals also properly rejected petitioners' contention that their allegations of bad faith or their invocation of "APA-recognized exceptions" warrant supplementation of the administrative record in this case. Pet. App. A47-A49. In any event, the court of appeals' resolution of those issues would not warrant this Court's review.

[8] Petitioners assert that there is a conflict in the circuits on that issue, but they rely—with one exception—on district court decisions. See Pet. 24-25. The only court of appeals decision that they cite, *Meyer* v. *Fidelity Sav.*, 944 F.2d 562 (9th Cir. 1991), is not on point, because it involved a *Bivens* challenge to a receiver's decision to terminate a bank officer's employment and not a challenge to the appointment of a conservator or receiver. In any event, this Court reversed that decision. See *FDIC* v. *Meyer*, 114 S. Ct. 996 (1994). Even if the court of

3. Finally, the court of appeals correctly held that the appointment of the conservator was not arbitrary and capricious. Petitioners do not contest that willful and continuing violation of a cease and desist order warrants appointment of a conservator. See 12 U.S.C. 203(a)(7) (Supp. II 1990). Furthermore, petitioners admit that they violated "policies required to be adopted by the [cease and desist] Order," although they contend that they did not "direct[ly]" violate "the Order itself." Pet. 30; see Pet. App. A52. As the court of appeals recognized, the contention that the cease and desist order "required only 'adoption,' not actual implementation, of the policies" would render the cease and desist order meaningless. *Ibid.* In any event, whether the Bank violated the cease and desist order in this case is a factual issue not warranting this Court's review.[9]

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appeals' decision in *Meyer* retained any vitality and conflicted with the decision in this case, that conflict would be one for the the Ninth Circuit, rather than this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[9] It is also doubtful whether it is possible any longer to provide petitioners with the relief they seek, since the bulk of the bank's assets and liabilities have now been sold. Petitioners sought to stay that transaction pending certiorari, but their application to this Court was denied by Justice O'Connor and then by the full Court. See *First Nat'l Bank & Trust, Wibaux, Montana* v. *Comptroller of the Currency, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996